

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 20,590
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) substantiating a report of exploitation by the petitioner allegedly perpetrated against her father in 2005. The issue at this time is whether, and under what circumstances, the petitioner's appeal should essentially be dismissed.

DISCUSSION

This is the second time that this matter has come before the Board. On June 6, 2008 the Board issued an Order remanding the case to the hearing officer for further proceedings to allow the Department to call the petitioner as a witness to establish its allegation that the petitioner had financially exploited her father, who is now deceased. That ruling is incorporated by reference herein.

Following the remand order, the Board on June 27, 2008 sent the parties a notice scheduling the matter for a telephone status conference on August 12, 2008. On July 7,

2008 the Board received a letter from the petitioner's husband alleging *inter alia* that the petitioner could not participate in the proceedings any longer because of her physical and mental health. On July 18, 2008 the hearing officer sent the following Memorandum to the Parties:

Based on the petitioner's husband's letter dated July 2, 2008, I will continue this matter until October 2008, at which time the matter will be scheduled for a telephone status conference. This continuance is based on the petitioner's representations that she is mentally and physically unable to participate in a hearing at this time.

Any further requests by the petitioner to continue the matter beyond October 2008 will need to be accompanied by updated medical verification of any alleged inability to participate in the proceedings.

On August 12, 2008 the Board received another letter from the petitioner's husband accompanied by the following note, dated July 15, 2008, from the petitioner's doctor at a community mental health agency:

[Petitioner] is under my care for treatment of symptomatic atypical bipolar disorder and severe Post traumatic Stress Disorder. At this time, [petitioner] is clinically stable, but ANY stress whatsoever imposed upon her will, in my opinion, risk an acute clinical decompensation with negative consequences on her health and well-being. I therefore feel that [petitioner] should NOT, for medical reasons, proceed with any further involvement concerning the matter before you. Thank you.

On September 3, 2008 the Board sent the parties a notice scheduling the matter for a telephone status conference in

the afternoon on October 7, 2008. On that morning the Board received a fax from the petitioner's husband, which consisted of the same letter and doctor's note he had sent on August 12, with the words "second notice" appearing at the top of the copy of the letter. Based on that correspondence the hearing officer did not attempt to call the petitioner on that date.

ORDER

The petitioner's appeal is dismissed, without prejudice.

REASONS

The Commissioner of the Department of Disabilities, Aging and Independent Living (DAIL) is required by statute to investigate allegations of abuse, neglect and exploitation of vulnerable adults, and to keep those records that are "substantiated" in a registry under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). If a report has been substantiated, the person who has been found to have committed abuse may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d). At these hearings the burden of proof is on the Department.

The petitioner's position in this matter poses an unprecedented dilemma for the Board. In its June 6, 2008 remand order the Board held that, to date, the Department had submitted admissible evidence that established only an *inference* of guilt on the part of the petitioner. However, the Board also made evidentiary and procedural rulings that the Department should be allowed to attempt to meet its burden of proof through calling the petitioner herself as a witness, and attempting to establish that her lack of credibility supported the inference established by the only other evidence deemed admissible--and the Board remanded the matter to the hearing officer for that purpose. In its remand the Board also specifically warned the petitioner "that her *refusal* to participate in the proceedings, as opposed to her *capacity* to do so, can be weighed against her in any consideration by the hearing officer as to her credibility" (emphasis in the original).

As noted above, the petitioner is not participating in the proceedings at this time. However, absent any evidence or indication to the contrary, the Board must take the July 15 statement of the petitioner's doctor as to her *capacity* to participate in the proceedings at face value. Based on that statement and the petitioner's correspondence, it appears

highly unlikely that the petitioner's ability to participate will "improve" anytime in the foreseeable future.

The problem, however, is that it is the petitioner who requested the hearing in the first place. Despite the petitioner's accusations, there is no evidence or indication that the Department is not proceeding in good faith based on its view that the petitioner's actions constituted exploitation of a vulnerable adult as defined in the statute that, if upheld after hearing, compel placing the petitioner in its registry.

In light of the above, the Board appears to have three choices. One would be to continue the matter what-now-appears-to-be indefinitely until the petitioner is able to participate in a hearing, essentially leaving the Department (and, arguably, the public, whose interest is protected by the registry) in limbo. Another would be to "default" the petitioner, even though her present claim of incapacity appears to be supported by medical evidence. Or, the Board can attempt to provide some form of relief at this time that provides a reasonable *status quo* under the circumstances, but is ultimately fair to both parties in the long term.

To this affect, the Board now issues what amounts to an "interim" order, essentially affirming the Department on the

basis of the as-yet-unrebutted inference in the evidence to date as found by the Board in its prior Order. However, the order shall be *without prejudice* to the petitioner to "refile" her request for fair hearing any time in the future if and when she is medically able to participate in further proceedings. Under this order, no deadlines are imposed on either party, but the Board will not consider the matter any further unless and until specifically asked to do so by the petitioner.

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